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2 capable of more than one interpretation.

3 If Your Honor doesn't have any
4 further questions, let me go on to the TOPRS
5 Indentures. For purposes of Intercompany
6 Claims, the definition of "Senior
7 Indebtedness" in the TOPRS Indentures turns
8 on two principles. The first is the
9 indebtedness has to be evidenced by notes,
10 bonds, debentures, or other securities. This
11 definition is actually certainly different
12 than the definitions used in 1987 Indenture
13 or the two Loan Agreements and it is
14 certainly, at least in Baupost/Abrams' view,
15 more limiting, because it requires evidence
16 of a Note/Bond Debenture and it has "or other
17 security." The 1987 Indenture uses "other
18 instruments" and, of course, the Loan
19 Agreements don't have anything like that.

20 Then the other key aspect, and
21 which is why we think the Enron Finance
22 Claims and the Cherokee Claims have to come
23 off the list, is the indebtedness has to be
24 sold by Enron. This is somewhat of a curious
25 definition. I don't know if I have ever seen

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2 it in any other indenture. It is certainly
3 not in the 1987 Indenture, but it is the
4 language that is used in the TOPRS
5 Indentures.

6 None of the Intercompany Claims for
7 which we have objected that are remaining --
8 the Enron Finance Claims and the Cherokee
9 Claims -- are ones that were sold by Enron.
10 Contrast that to the claims of Enron Equity
11 Corporation. We had initially objected to
12 it, but after it was demonstrated to Baupost
13 and Abrams that these particular claims were,
14 in fact, sold by Enron, there was a warrant
15 to purchase these notes that was held by
16 Enron Equity Corporation. That is nothing
17 like that with respect to the Enron Finance
18 Claims or the Cherokee Claims. This
19 language, we submit, is unambiguous and no
20 other party with respect to the Intercompany
21 Claims has disputed the terms as ambiguous
22 with respect to what is meant by "sold by."

23 I have one other point to add, by
24 using the terms "notes, bonds, debentures, or
25 other securities sold by Enron," it suggests

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2 notes, bonds, and debentures are things that
3 will be sold into the public market. So for
4 purposes of trying to understand whether or
5 not this term is ambiguous or unambiguous,
6 Baupost/Abrams submits it is unambiguous.
7 The term is what it says, these claims have
8 to be sold by Enron; and Enron Finance and
9 Cherokee Claims were not.

10 If Your Honor doesn't have any
11 further questions, I was going to turn to the
12 Letter of Credit Claim?

13 JUDGE GONZALEZ: No. Go ahead.

14 MR. WINSTON: Again, each of the
15 claims that we have objected to are claims
16 for which Enron has an obligation to
17 reimburse the issuer of a letter of credit.
18 With respect to the 1987 Indenture, the 1987
19 expressly excludes from the definition of
20 "indebtedness" contingent obligations in
21 connection with the indebtedness of others.
22 The carve-out seems to expressly state that
23 agreements to ensure the payment of
24 obligations of third parties are ones that
25 are excluded from the definition of

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2 "indebtedness." Now, if it is not
3 indebtedness, then it can't be Senior
4 Indebtedness. It is hard to conceive that
5 obligations to reimburse an issuer of a
6 letter of credit would not fall within that
7 carve-out.

8 By definition, you are reimbursing
9 a party, who has already paid somebody else,
10 for which you have your own independent
11 obligation. How is that not a conditional
12 obligation to ensure the payment to a third
13 party, is one that I can't believe there is
14 any dispute.

15 Now, one argument that has not been
16 made, but it may be made, is whether or not
17 the 1987 Indenture measures whether an
18 obligation is contingent on the moment the
19 obligation is created or at some time in the
20 future. Baupost/Abrams argues for purposes
21 of the Letter of Credit Claims, it is
22 measured from the date the obligation was
23 created and there are two reasons for that.

24 The first point is any other result
25 would be absurd, because any contingent

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2 obligation will at some point in the future
3 be non-contingent, either the contingency
4 will pass and there is no obligation or the
5 contingency will come to fruition and there
6 is a liquidated obligation. Why would you
7 have this exclusion, unless you measured the
8 date the obligation is created?

9 The second point is compared to the
10 definition of "Subsidiary." The definition
11 of "Subsidiary" in the 1987 Indenture
12 expressly contemplates future events, because
13 it is certainly possible, as the 1987
14 Indenture points out, that voting control of
15 one of the entities, for which we have
16 qualified as a Subsidiary, is in the hands of
17 third parties, but that voting power is
18 contingent on the date the obligation was
19 created, where in the future it may manifest
20 itself. So that party does have voting
21 control. For purposes of the definition of
22 "Subsidiary," it would no longer be a
23 subsidiary because a third party has voting
24 power. There is nothing like that with
25 respect to any other conditional obligations.

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2 So for purposes of determining
3 whether or not letters of credit
4 reimbursement obligation are within the
5 definition of "indebtedness" and, therefore,
6 within the definition of "Senior
7 Indebtedness," Baupost/Abrams submits they
8 are clearly not.

9 The last point, Your Honor, with
10 respect to the 1987 Indenture, goes to the
11 definition of "Senior Indebtedness." As I
12 mentioned earlier, it requires an obligation
13 evidenced by a note, bond, or instrument for
14 money borrowed. Under the principle of
15 ejusdem generis, Courts look to the phrase
16 "other instruments" in relation to bonds,
17 debentures, and notes. A bond, debenture, or
18 note in an unconditional promise to pay an
19 amount of money, and an obligation to
20 reimburse a letter of credit issuer is not an
21 obligation to pay a fixed amount of money.
22 It depends on the amount of the draw. So it
23 is not like a note, bond, or debenture and,
24 therefore, it is not an instrument and,
25 therefore, it is Non-Senior Indebtedness.

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2 The last point or the last part of
3 my argument goes to the TOPRS Indentures, and
4 I think this one is the easiest of all of
5 them. In order to cause Senior Indebtedness,
6 as I mentioned earlier, an obligation must be
7 evidenced by note, bond, debenture, or other
8 security and has to be sold by Enron.
9 Obligations to reimburse letter of credit
10 issuers are not notes, bonds, debentures, or
11 other securities. It is even more narrow
12 than the 1987 Indenture, and they are not
13 obligations for which Enron sold anything.
14 It is a contractual agreement to reimburse
15 somebody. That is not an obligation to sell.

16 Unless Your Honor has any further
17 questions, I have finished my presentation.

18 JUDGE GONZALEZ: No. I don't at
19 this time.

20 MR. WINSTON: Thank you, Your
21 Honor.

22 JUDGE GONZALEZ: I assume you are
23 rising for John Hancock? Is that right,
24 Mr. Wiles?

25 MR. WILES: Yes.

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2 JUDGE GONZALEZ: And who else?

3 MS. REID: Your Honor, Sarah Reid
4 for JPMorgan Chase.

5 MS. KRIEGER: And Arlene Krieger
6 from Stroock on behalf of Bayerische Hypo-Und
7 Vereinsbank.

8 MS. CATON: And Amy Caton from
9 Kramer Levin on behalf of the
10 Choctaw/Zephyrus Holders, each on behalf of
11 themselves and certain managed funds and
12 accounts.

13 JUDGE GONZALEZ: We will commence
14 with the one closest to the microphone.

15 MR. WILES: Thank you, Your Honor.
16 I guess the race is to the swift.

17 JUDGE GONZALEZ: Please speak
18 louder though, please.

19 MR. WILES: Michael Wiles for John
20 Hancock Life Insurance Company.

21 Your Honor, we do not have a letter
22 of credit issue. We only have an issue as to
23 the treatment of notes, because John Hancock
24 was not involved in any letters of credit.
25 So I am not going to address any of the

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2 letter of credit issues. They just don't
3 affect us.

4 What John Hancock has is, by virtue
5 of a settlement, it has an assignment of
6 Enron Equity Corporation's interests in three
7 promissory notes of approximately \$107
8 million that were signed and executed by
9 Enron Corporation.

10 Now, there are a couple of things
11 that I would like to address. Number one, is
12 the comment by Baupost as to what standard of
13 review or burden of proof should apply. I
14 will note that the cases that Baupost has
15 cited are cases in which a creditor whose
16 claim is being subordinated is challenging
17 somebody else's right to force that creditor
18 to be subordinated to that person.

19 In this situation, absolutely
20 nobody whose claim is being subordinated has
21 objected to what the Debtors have proposed in
22 their Schedule S. The Debtor, which is a
23 party to all of these agreements, obviously
24 hasn't objected. In fact, the Debtors have
25 stated that their own understanding of how

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2 these agreements work is that the parties
3 listed on Schedule S are entitled to the
4 benefits of subordination. No other party
5 who is a beneficiary of subordination has
6 objected. You have only got Baupost, which
7 is not a party to any of the agreements, it
8 is not a subordinated party, and it is only
9 one of the beneficiaries. They are the only
10 ones that have challenged what Enron has
11 proposed and what Enron and everybody else
12 involved agree is the correct interpretation
13 of these contracts.

14 I do not think it is right under
15 those circumstances to say that it is
16 everybody else's heavy burden to prove that
17 Baupost is wrong. Quite the contrary.
18 Baupost is not a party to these agreements.
19 I would say the burden is on Baupost to show
20 that for some reason, as an interloper to the
21 contracts, as only one beneficiary, it
22 somehow has a superior understanding to
23 everybody else's understanding of how these
24 agreements work. But whatever you say the
25 burden of proof is, it doesn't really matter.

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2 Because if you have got clear and unambiguous
3 contract language, that satisfies any burden
4 of proof, however you want to define it.

5 Now, Enron did not list the EEC
6 Notes as being subject to the subordination
7 under the 1987 Indenture. We did not
8 challenge that, so that is not an issue.

9 As to the TOPRS Indentures, Enron
10 did list the EEC Notes as being entitled to
11 the benefit of that subordination. Baupost
12 initially objected, but then has withdrawn
13 its objection. But it is important to see
14 what Baupost has said about that, because it
15 actually seriously contradicts what they have
16 said about the other Loan Agreements.

17 The TOPRS Indentures define "Senior
18 Indebtedness" as meaning "all
19 indebtedness" -- I am just going to skip over
20 the irrelevant words here -- "all
21 indebtedness ... evidenced by notes,
22 debentures, bonds or other securities sold by
23 the Company for money borrowed ..."

24 Now, we have produced evidence that
25 the Enron Equity Notes were notes for money

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2 borrowed, and that they were sold. Baupost's
3 counsel acknowledged during oral argument
4 that there is nothing ambiguous about that
5 language. They acknowledged in the papers
6 they filed, at paragraph 22 in their response
7 that each EEC Claim is evidenced by a
8 promissory note for money borrowed, that they
9 were sold, and that they concede, therefore,
10 that they are entitled to the benefits of
11 subordination under the TOPRS Indentures.

12 Well, compare that to the language
13 in the 1993 and 1994 Loan Agreements where
14 Baupost is still challenging whether the EEC
15 notes are entitled to subordination. The
16 TOPRS Indentures said "all indebtedness
17 evidenced by notes for money borrowed." The
18 1993 and 1994 Loan Agreements say "all
19 indebtedness for money borrowed." The only
20 difference is that the TOPRS Indentures
21 impose an additional requirement -- that
22 there be a note.

23 Now, if that language is
24 unambiguous and if the EEC Claims, admittedly
25 in Baupost's own view, are entitled to

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2 subordination under that, I don't see how
3 conceivably the fact that the word "notes"
4 was dropped out in the 1993 and 1994 Loan
5 Agreements could somehow create an ambiguity
6 as to whether the EEC Claims are entitled to
7 the benefits of that subordination.

8 When Baupost argues that there is
9 supposedly some ambiguity in the word
10 "indebtedness," there is no ambiguity in the
11 word "indebtedness." What they are really
12 saying is they are not challenging so much
13 that this is a debt. In fact, they admitted
14 for purposes of TOPRS Indentures that it is a
15 debt and that it is for money borrowed. What
16 they are really saying is that they want to
17 argue to you that there is some ambiguity as
18 to whether some debts are excluded, not based
19 on whether they are debts, but on who holds
20 them. In that regard they are not really
21 arguing that there is anything ambiguous
22 about the word "indebtedness." They are
23 arguing that somehow there is something
24 ambiguous about the fact that the loan
25 agreements refer to "all indebtedness," and I

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2 submit to you that there is nothing ambiguous
3 about the word "all." All means all. If you
4 have got no exceptions that are listed, that
5 is what it means and you don't exclude any
6 indebtedness just because it is held by a
7 Subsidiary or by an affiliate.

8 The only argument that they have
9 made as to whether there is any ambiguity is
10 not based on any of the language of the
11 contracts, it is based only on this
12 prospectus, which in their view, because it
13 had a consolidated financial statement,
14 supposedly didn't include the EEC notes in
15 describing the debts that would constitute
16 indebtedness to which subordination would
17 apply. That is parol evidence that you
18 shouldn't even look to, because there is no
19 ambiguity in the contract. But not only
20 that, the EEC notes didn't even exist at the
21 time that prospectus was published. They
22 couldn't have been referred to and listed in
23 the prospectus, because they were executed in
24 two cases on December 30, 1994, and in one
25 case in 1996, which is after the two Loan

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2 Agreements in question. So how the
3 prospectus could possibly be interpreted as
4 saying anything about the treatment of those
5 notes is beyond me.

6 "Indebtedness" is a very simple
7 interpretation. It is in the dictionary. It
8 says, "Something, as an amount of money, that
9 is owed." There is no ambiguity in that, and
10 I submit to you that their concession that we
11 are entitled to subordination under the TOPRS
12 Indentures ought to also end the question as
13 to the 1993 and 1994 Loan Agreements.

14 Thank you, Your Honor.

15 JUDGE GONZALEZ: Thank you.

16 The next person?

17 MS. REID: Good morning, Your
18 Honor. Sarah Reid from Kelley Drye & Warren
19 appearing on behalf of JPMorgan Chase Bank,
20 NA, as agent for the certain financing
21 transactions known as Choctaw/Zephyrus and
22 the Syndicated Letter of Credit Facilities,
23 as well as appearing on its own behalf.

24 Your Honor, at the outset, I would
25 like to try just briefly to focus on the law

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2 which applies to Your Honor's analysis today
3 in this intercreditor dispute.

4 Amended Schedule S, which has been
5 proposed by the Debtors, is an analysis of
6 who is entitled to subordination, and who is
7 not; what is senior debt, and what is not.
8 Under 510(a) of the Bankruptcy Code, "Any
9 analysis of a Subordination Agreement must be
10 interpreted purely by reference to state
11 law." The law is well-settled in that
12 regard.

13 There has been, as I am sure Your
14 Honor is aware, litigation in this regard
15 both in the Eleventh Circuit and in the First
16 Circuit, culminating in the First Circuit in
17 the Bank of New England case of last year.

18 So there can be no reference to
19 anything, other than the state law, and state
20 law without reference to Bankruptcy Rules of
21 interpretation.

22 That I wanted to say at the outset,
23 and then I wanted to just briefly reiterate
24 the point made by John Hancock, that this is
25 not a case which is the normal case where a

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2 junior creditor who is being subordinated is
3 before the Court arguing that the
4 subordination provision should not be
5 applied. This is a case where another in
6 essence senior creditor is basically raising
7 an argument essentially in order to avoid, as
8 they would see it, some form of dilution.
9 They are the only person before your Court.
10 There is no junior creditor who has come to
11 this argument today to raise the issue that
12 the subordination has been improperly applied
13 by the Debtors in their Amended Schedule S.

14 Turning to the rules of
15 construction that are going to govern Your
16 Honor's analysis, they are the normal
17 fundamental state law rules of construction.
18 These particular documents vary in terms of
19 which state law they refer to. Some are New
20 York and some are Texas, but the basic rules
21 between the jurisdiction, I think, are all
22 the same.

23 The proper interpretation of an
24 unambiguous contract is a question of state
25 law for the Court, and in order to look to

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2 the contract, courts look to the plain
3 meaning. That includes looking at the
4 dictionary, if needed, for the plain and
5 ordinary meaning of the words in a contract.
6 A Court may only look to the four corners of
7 the contract. It may not look outside of it.
8 It may not look at other contracts or other
9 extrinsic evidence in terms of its initial
10 analysis of the contract and what it means.

11 Before looking to anything, a Court
12 must make a finding that a particular term is
13 ambiguous, and it is only at that point after
14 finding that any extrinsic evidence can be
15 introduced, and even then, extrinsic evidence
16 may not be introduced to rewrite the terms of
17 the contract, but only to explain the
18 judicially found ambiguity. It is important,
19 because for purposes of today's argument, the
20 Court should disregard any citation to the
21 prospectuses or the 10Q that Baupost has
22 proffered. That is extrinsic evidence. It
23 is not properly before the Court at this
24 point in time and would only be proper if and
25 when the Court after consideration determines

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2 that some particular term is ambiguous.

3 Thus, Baupost's Exhibits E, F, I, J and K are
4 not properly before the Court at this point.

5 Not that I think that anything is
6 ambiguous -- and I will get to that in a
7 moment -- but if the Court were to find
8 ambiguity, then under the learning from the
9 Bank of New England court and others,
10 basically you would have a period of
11 discovery where the parties would find
12 documents and take depositions in order to
13 attempt to determine what the correct meaning
14 of the term is. You get into whole areas of
15 the law as to whether it has to be
16 objectively expressed intent versus intent
17 that was never expressed. Most courts say
18 that you have to have it communicated at the
19 time.

20 So you have a period where
21 discovery is taken, and then the Court has a
22 hearing. The Court hears from whatever
23 witnesses there are, looks at the documents,
24 and then makes a determination. As some of
25 the cases show, in the event that after all

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2 of that it turns out there is really nothing
3 very helpful there, the Court then has to go
4 back and decide it as a matter of law. So
5 that is the kind of framework we are working
6 in at this point.

7 I will now turn to the merits of
8 each of the arguments that Baupost has
9 advanced. Basically, the Court has to apply
10 a common sense meaning to the words, read
11 them as a whole, and make a determination as
12 to what was the purpose overall of the
13 particular provision.

14 I would like to do this, with Your
15 Honor's permission, claim by claim, because I
16 think it is easier and will ultimately go
17 faster.

18 So I would like to turn first to
19 the Cherokee Claim, which is claim number
20 1132, Exhibit B to our response to the
21 Objection. That claim has been settled. The
22 Settlement Agreement is also attached to our
23 Objection as Exhibit A. It has been allowed.
24 It is a claim that is premised on Enron's
25 guaranty of an ENA Note, which was then

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2 assigned to JPMorgan, as agent for the
3 Choctaw Lenders.

4 Baupost had initially challenged
5 the Cherokee Claim under the 1987 Indenture.
6 It has withdrawn its objection, because it
7 has conceded that Cherokee was a
8 "Non-Controlled Subsidiary," as that terms is
9 defined in the 1987 Indenture.

10 So we will come back to the 1987
11 Indenture with EFP. I am going to contrast
12 that with Cherokee, but I just wanted to
13 bring that out at this point.

14 So basically we turn to the TOPRS
15 Indentures, which Baupost has annexed, and it
16 is Exhibits C and D's relevant language. We
17 turn to the definition of a "Senior
18 Indebtedness," which is on page 6 of at least
19 the 1997 Indenture, and they are virtually
20 the same in both.

21 If you look at the definition of
22 "Senior Indebtedness" in the TOPRS
23 Indentures, it really is a very broad
24 definition when you read it as an entirety.
25 Senior Indebtedness means the principle of,

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2 premium, of any, and interest on and any
3 other payment due pursuant to any of the
4 following, whether outstanding now or
5 hereafter created: all indebtedness of the
6 Company (other than for trade creditors)
7 evidenced by notes, debentures, bonds, or
8 other securities sold by the Company for
9 money borrowed and capitalized lease
10 obligations.

11 Then it goes on and says, all
12 indebtedness of others of the kinds described
13 in the preceding clause (i) assumed or
14 guaranteed in any manner by the Company.
15 That is exactly our situation. We have a
16 note, an ENA note, guaranteed by the Company.
17 It is clearly debt. It is a note and it is
18 -- let me finish the definition -- not
19 explicitly subordinated by its terms. That
20 is the final piece of the Senior Indebtedness
21 definition in TOPRS.

22 So, basically, the way this works
23 is, unless you are a trade creditor or unless
24 you were explicitly subordinated, your Senior
25 Indebtedness under the TOPRS' Senior

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2 Indebtedness definition.

3 Now, to me, reading it as a whole,
4 it couldn't be clearer what this indenture
5 was trying to do. But Baupost's argument is,
6 as I understand it, as follows: "No. What
7 this indenture really means is something much
8 more limited." They want to take this clause
9 modifying "other securities," which says
10 "sold by the Company" and apply it back to
11 notes and debentures and make a requirement
12 that a note or a debenture has to be sold.
13 This is a non-plain, twisted meaning. Notes
14 and debentures are clearly for money
15 borrowed. They are clearly debt. It is
16 completely atypical in any indenture to
17 require that they would be sold as some
18 element of Senior Indebtedness. That is not
19 something that is ordinary, at least that I
20 have seen, and I think Mr. Winston said he
21 hadn't seen it either.

22 I would point out to Your Honor, it
23 really makes no sense, because, apparently,
24 if you take their meaning of "sold by the
25 Company," notes, debentures, and bonds have

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2 to be sold by the Company and the capitalized
3 lease obligations wouldn't. It makes no
4 sense because in the case of other
5 securities, you can have an instance -- in
6 fact, many instances -- where they are not
7 sold for money borrowed. They are sold as
8 equity. They are sold as common stock. They
9 are sold as preferred. So what this is
10 attempting to do is capture debt, but not
11 capture any kind of an equity security
12 interest.

13 I wanted to point out, because this
14 issue really was I think most fully briefed
15 by Baupost in its reply to which we had not
16 filed a written response, that the ruling
17 enunciated makes sense under the basic rules
18 of contract construction and the rules of
19 grammar, namely what is called the "last
20 antecedent rule," which is simply put
21 "ordinarily qualifying phrases are to be
22 applied to the words immediately preceding
23 and not extending to ones or to others more
24 remote within the phrase."

25 I just cite, Your Honor, to one

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2 case in this regard, and that, in turn, will
3 cite you to others. It is Grupo Condumex v.
4 SPX Corp., 163 F.Supp.2d 857 at 861. It is a
5 federal case from the Northern District of
6 Ohio. There are other cases like that, but I
7 thought that one was particularly helpful in
8 terms of its talking to the fact that you
9 have to look at what makes sense within the
10 clause and that ordinarily you look to what
11 is immediately preceding, rather than try and
12 import it back to more remote phrases.

13 The other point that Baupost has
14 made with regard to Cherokee references to
15 the various prospectuses. As I have already
16 pointed out, that is extrinsic evidence. It
17 is not properly before the Court. The Court
18 would have to make a finding that the
19 definition of "Senior Indebtedness" is
20 somehow ambiguous before any such evidence
21 would be proffered, and then it could only be
22 proffered in the context of a hearing.

23 These prospectuses speak to
24 nothing. This debt wasn't incurred. There
25 is no way of knowing what would or wouldn't

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2 have been entered on the financial statements
3 and what probative value it would have. It
4 is just simply not an appropriate citation or
5 evidence for the Court to consider at this
6 point in the proceedings.

7 Let me turn briefly in terms of the
8 Cherokee Claims to the 1993 and 1994 Loan
9 Agreements. Again, the term here is
10 extremely broad and even, I think, the
11 broadest of all of the ones that we are
12 looking at. The term "Senior Indebtedness"
13 means the principal, premium, and interest on
14 all indebtedness of Enron, whether
15 outstanding at the date hereof or hereafter
16 created for money borrowed or evidenced by a
17 note or similar instrument. Then it goes on,
18 any indebtedness of others of the kinds
19 described above, payment for which Enron is
20 responsible, as a guarantor.

21 The Cherokee Claim falls squarely
22 under this definition. It is Enron's
23 guaranty of a note and, as such, it could not
24 be clearer that it has properly been
25 classified as Senior Indebtedness.

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2 Baupost's argument that because
3 there is no definition of the word
4 "indebtedness", it must necessarily be
5 ambiguous, I think, would stand contract
6 interpretation on its head. Many contracts
7 have words used. We all understand what they
8 mean. "Indebtedness" means money owing. It
9 is a debt of some sort. This particular,
10 very broad definition makes it clear that it
11 is trying to encompass as much debt as
12 possible. There is nothing that this Court
13 could or should do in making any kind of
14 finding that this is anything other than
15 ambiguous. You can imagine what the hearing
16 would be like on what is indebtedness in
17 general? This is not a term that Your Honor
18 needs evidence on in order to reach its plain
19 and undisputed meaning.

20 So under all of these
21 circumstances, the Court need look no
22 further. The Cherokee Claim was properly
23 included on Amended Scheduled S.

24 I would like to turn now to claim
25 number 1126. That is Exhibit C to our paper.

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2 That is the EFP Claims, Class 185 and Class
3 4. The Class 185 claim is like Cherokee -- a
4 claim based on Enron's guaranty of an ENA
5 note. The Class 4 is a direct claim against
6 Enron through a Demand Promissory Note. Both
7 are, again, assigned to JPMC, as agent for
8 the Zephyrus Lenders.

9 In this case, let's start with the
10 1987 Indenture, and I just want to go to the
11 way the 1987 Indenture is set up. It, unlike
12 the TOPRS Indentures, has a definition of
13 "Senior Indebtedness" and a definition of
14 "indebtedness" itself.

15 Basically the Baupost argument is
16 not that these claims do not meet the
17 definitions of "Senior Indebtedness" and
18 "indebtedness," but what they basically argue
19 is that you have to carve out what would
20 otherwise be properly classified as senior
21 debt, because it is held allegedly by a
22 Subsidiary. That exception is in the "Senior
23 Indebtedness" definition at the very end,
24 where it says that indebtedness of a Company
25 to a "Subsidiary" defined term is excluded.

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2 Baupost's argument with regard to
3 this starts with the premise that the Court
4 has to ignore the indenture's own definition
5 of "Subsidiary" and "corporation." I just
6 want to read those to you. I should say at
7 the outset, EFP is not a corporation.
8 Everybody agrees to that. It is a limited
9 liability company. So it is not, unlike
10 Cherokee, a corporation.

11 The definition of "Subsidiary" says
12 "Subsidiary" means a corporation all of the
13 voting shares ... of which shall be owned by
14 the Company or by one or more Subsidiaries."
15 It basically explicitly references that you
16 have to exclude shares "entitled to vote only
17 upon the happening of some contingency unless
18 such contingency shall have happened.
19 Everybody agrees that the contingency did
20 happen." EFP was not controlled by Enron
21 from the point of the petition through the
22 settlement. I think the only dispute on that
23 occurs at the point that you actually have
24 distribution.

25 The point that Baupost doesn't

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2 raise to Your Honor, and which I think is
3 interesting, page 3 of the indenture defines
4 what a corporation includes, and it says: "A
5 corporation includes corporations, voluntary
6 associations, joint stock companies, and
7 business trusts." So that is it. It doesn't
8 include limited liability companies. This
9 exclusion doesn't apply. There is no need to
10 take evidence or look into anything further.
11 There is nothing ambiguous about this. You
12 have basically the Senior Indebtedness
13 exclusion. It refers to what a Subsidiary
14 is. It says a Subsidiary means a
15 corporation, and the indenture tells you what
16 a corporation is. EFP is not a corporation
17 and, accordingly, that should be the end of
18 the inquiry.

19 Now, I will just take a moment on
20 it, because I really do think the document is
21 so clear that we don't need to spend a lot of
22 time on it. But basically Baupost's argument
23 is: "Look, we want this Court to ignore the
24 fact that EFP is not a corporation and
25 pretend it is a corporation for purposes of

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2 this analysis, and now we want to say that as
3 a result of the settlement in the
4 Choctaw/Zephyrus case, where we concede
5 Choctaw, which really was a corporation,
6 continues and is entitled to the benefit of
7 Senior Indebtedness, even though there was
8 this settlement, now we want to say because
9 EFP had a different corporate form and ended
10 up redeeming its shares, somehow that means
11 it is now disqualified and it should no
12 longer be allowed to have Senior
13 Indebtedness." It is an Alice in Wonderland
14 argument, because it is basically asking the
15 Court to ignore the indenture's own structure
16 and pretend it is a corporation when it is to
17 Baupost's benefit. Then when, all of a
18 sudden, you get to the point and you say,
19 "Well, because it is a limited liability
20 company and because we had to deal with it
21 differently in order to effect the same
22 result that we effected in Cherokee, now
23 suddenly it is not entitled to be a senior
24 listed on Amended Schedule S."

25 That is clearly not what anybody

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2 thought or intended with the settlement. The
3 Court doesn't need to get into all of it,
4 because, frankly, the indenture just could
5 not be clearer that EFP does not fall within
6 that Subsidiary exclusion.

7 Let me just briefly talk about
8 Claim 4 of EFP, which Mr. Winston mentioned.
9 The ECIC Note, which was the direct
10 obligation of Enron, was part of an
11 integrated financing transaction that
12 occurred all on the same day. The note was
13 entered into and immediately assigned to EFP
14 where it was held and listed as credit
15 protection for the Zephyrus entities. The
16 reason it was contributed was as credit
17 protection. It has been filed and
18 prosecuted, as EFP was the holder. At this
19 point to now argue that it is really ECIC's
20 obligation and that that somehow makes it
21 subject to the exclusion ignores the reality
22 that this is debt. It was security. It was
23 credit protection. It was part of a
24 simultaneous financing. It has been filed as
25 part of EFP's proof of claim. It has been

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2 allowed as such, and the whole way the
3 bankruptcy has dealt with this has been as an
4 EFP claim.

5 Just briefly, we turn to the TOPRS
6 Indentures. The analysis is the same as what
7 I have already gone through with Your Honor
8 on Cherokee. EFP Class 185 has a note
9 guaranteed by Enron, clearly Senior
10 Indebtedness. There is no requirement. It
11 has to be sold, under the terms of the
12 definition of "Senior Indebtedness." It
13 basically is clearly debt which is entitled
14 to such classification. EFP Class 4 is a
15 direct note against Enron and it falls under
16 the first part of the definition and,
17 accordingly, is clearly senior debt under the
18 TOPRS Indentures.

19 In 1993 and 1994, again, the same
20 analysis as what I went through with
21 Cherokee. Given the very broad definition,
22 you either have a direct obligation in clause
23 1 of the EFP 4 Claim or you have a guaranty,
24 similar to Cherokee, with the EFP 185 Claim.

25 Let me turn finally to the Letter

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2 of Credit Claims. Baupost makes no argument
3 that vis-a-vis the 1993 and 1994 Loan
4 Agreements that these are not senior and
5 essentially concedes that they are. It is
6 only vis-a-vis the 1987 Indenture and the
7 TOPRS Indentures that they make an argument.

8 At the outset, I just want to
9 briefly talk about what a reimbursement
10 agreement is. It is annexed to our lengthy
11 and bulky Objection. At Exhibit G is the
12 Letter of Credit Reimbursement Agreement in
13 the amount of \$500 million, May 14, 2001.
14 Exhibit H is the Master Letter of Credit and
15 Reimbursement Agreement, as of June 16, 1995.

16 It is interesting that both of
17 these Reimbursement Agreements are a direct
18 obligation between Enron Corporation and the
19 Bank, as agent -- that is in Exhibit G,
20 because it was a syndicated facility -- or
21 just the Bank alone under the Bilateral
22 Master Agreement.

23 A Reimbursement Agreement is a
24 direct contractual obligation of Enron and is
25 similar to a revolving credit line. It is